LOOKING FORWARD IN THE LAW

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The dearest desire of man and the greatest necessity of society is justice; that will be conceded, even by the unthinking. The means by which that justice has been obtained have, however, been a cause for criticism from immemorial times.

The thought of statesmen, the labor of jurists, the activities of lawyers and the hopes of litigants have been directed toward the solution of this great problem. How shall speedy justice be achieved? How shall men, under the law, best secure the rights guaranteed them by that law? The question is age old and is still unanswered, save in the striving of those who look toward the light and see visions of a day when social and economic justice shall prevail. Yet with all of the effort that has been made, little of real progress has been accomplished. Litigation drags and justice is delayed and thereby denied.

It is customary to criticize the lawyers for this condition, but as a matter of fact the most persistent advocates of simplified procedure are the lawyers. They, of all others, realize the hardships that litigants, and particularly poor litigants, suffer by reason of delay and have, therefore, bent their efforts to seeking not only relief but a remedy.

It is more difficult to persuade a legislator that procedural reforms or changes in the judicial system advocated by lawyers are desirable than it would be physically to put a camel through the eye of a needle. Yet practically all of the social and economic reforms in California in the past eight years were conceived, advocated and adopted by lawyers and with their active support and assistance. While lawyers have not hesitated to radically change social and economic laws, they have been content, as a rule, with endeavoring to adapt present machinery to the advancing needs of the times. Yet their outlook has been forward as the facts will show.

This condition is not peculiar to California but is general throughout the country. Everywhere the tendency is toward

expedition in litigation and a higher realization of the lawyer's obligation of service, and there is every reason to believe that the development will be in the direction of more radical reforms, not only in procedure, but in the machinery of judicial organization.

I. EFFORTS TOWARD PROCEDURAL REFORM AND JUDICIAL REORGANIZATION

In California the principal factors in the movement for procedural reform have been the state and local bar associations, particularly those of San Francisco and Los Angeles, and the Commonwealth Club of California, an organization for the study and discussion of civic problems, located at San Francisco.

These organizations made the first definite concerted effort for procedural reform, one of the most important accomplishments being an amendment to the Constitution providing that:

> No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.[1]

Many drastic reforms have been advocated, among which were the abolition of the demurrer and the motion to strike out, it being declared that such matters were usually injected for purposes of delay and could very well be discarded. The outcry from the legal profession against such a drastic change in the procedure was enough to turn a none-too-friendly legislature against the proposals and they were not accorded a hearing. It is only just to state that so many politico-social questions requiring new and drastic legislation were pending at the session referred to (1911) that few matters not programmed were considered.

The California Bar Association has been a strong factor in the movement for procedural reform and has succeeded in a measure in having some of its measures enacted into laws. It has succeeded in simplifying the practice as to new trial and appeal and has labored diligently, but frequently without success, because of the indifference and ignorance of successive legislatures as to the desirability of the reforms proposed. The results, however, so far as the

[1] Constitution of California, Sec. 4½, Art. VI.

elimination of delay, the expedition of business and the relief of congestion was concerned have not come up to expectations, particularly in the latter instance, where litigation has multiplied faster than facilities have been provided for handling it.

One of the most important movements for the simplification of practice was inaugurated by the California Bar Association in 1915 through the creation of a Special Section to report on the advisability of governing procedure by flexible rules of court instead of by rigid statutory enactments.

This committee, of which R. S. Gray of the San Francisco Bar was chairman, and Walter Perry Johnson, Percy V. Long and Garrett W. McEnerney of San Francisco, and Judge Lewis R. Works and Joseph P. Loeb of Los Angeles, composed the personnel, made an exhaustive study of the entire question and presented a comprehensive report, recommending that the making of procedural rules be transferred from the legislature to the Supreme Court.

Professor Roscoe Pound, Dean of the Harvard University Law School, came to California, and at the Monterey Convention of the California Bar Association, in 1916, gave a scholarly and logical exposition of the entire subject of the government by the courts of the procedure in matters before them. The convention after elaborate discussion endorsed the plan in principle.

The legislative extra session of 1916[2] had requested suggestions from the justices of the Supreme Court and district courts of appeal, from the judges of the superior courts, and from the state and local bar associations as to changes "necessary to prevent delay incident to litigation in this state." Acting upon this invitation the California Bar Association recommended the appointment of a joint committee of legislators and lawyers to consider measures "for the relief of the courts." Such a committee was created,[3] made up of the chairmen and members of the Senate and Assembly judiciary committees and certain prominent members of the bar, men of large business, ability and experience, and thoroughly representative of the profession.

The joint committee, or rather the lawyer members, met during the legislative recess and devoted a week to the discussion of twelve suggestions that crystallized out of a day's argument. These

[2] A. C. R. 2, Stats. 1916, p. 50.

[3] S. C. R. 11, Stats. 1917, Chap. 14.

suggestions were representative of the thought of the lawyers in attendance and were designed to furnish a method not only of temporary relief but of permanent relief from congestion and delay. At the risk of seeming tiresome, the suggestions are here appended:

1. That the original and appellate jurisdiction of the Supreme Court be limited to constitutional questions, construction of statutes and important public matters.
2. That the present method of reviewing decisions of the District Court of Appeal be retained, and upon granting a review, the review to be heard in the Supreme Court.
3. That two additional District Courts of Appeal be provided, making five in all.
4. That instead of providing two additional District Courts of Appeal, two judges be added to the present District Courts of Appeal, making five members instead of three, and that the courts have power to decide cases by a majority of the judges.
5. That an Appellate Court having jurisdiction of a cause, instead of remanding it to a lower court when judgment is reversed, shall proceed to fully hear and determine the cause and enter final judgment.
6. That superior judges be elected by districts, thereby reducing the number of superior judges in localities for the purpose of equalizing the work.
7. That rules of procedure be adopted by the Supreme Court, or the Supreme Court sitting with a commission, or in some manner which, when adopted, shall supersede the present provision in the Code of Civil Procedure.
8. That the absolute right of appeal be limited to certain cases; that in other cases appeal be granted upon petition.
9. That a commission or some person be vested with judicial supervision.
10. That the jurisdiction of the courts be made elastic, so that the legislature may, under limitations, change the jurisdiction or increase the number of Superior Courts or judges, District Courts of Appeal or judges.
11. That the legislature be given power to provide for justice courts, municipal courts and inferior courts, provide for their jurisdiction and have power to delegate to municipalities the creation of such courts.
12. That admission to practice be regulated.

Professor Orrin Kip McMurray, of the Department of Jurisprudence of the University of California, was insistent that no real relief could be secured by adding to the old system and advocated the creation of a "Unified Court" after the suggestions of the

American Judicature Society, presenting at the same time a minority report recommending the consolidation of the various inferior courts into one tribunal of enlarged jurisdiction, similar to the Municipal Court of Chicago, particularly in the more populous counties and municipalities.

These suggestions, while favorably received, were discarded, together with the suggestion that the jurisdiction of the courts should be more elastic and that the legislature should have power under limitations to change not only the number and jurisdiction of the superior courts, but should be able to increase the number and alter the jurisdiction of the district courts of appeal as well, as the committee did not deem it advisable to import into its recommendations anything drastic or apparently revolutionary.

The committee was largely nfluenced in its final recommendations by expediency and the necessity for suggesting only such things as the legislature would absorb. With the end in view of securing some measure of relief, at the same time suggesting a means by which judicial administration might be improved, the committee presented four suggestions:

That two additional District Courts of Appeal be provided, making five in all.

That the administration of justice be supervised by a commissioner to be appointed by the governor.

That procedure should be governed by rules of court instead of by legislative enactments; and

That the standards and requirements for admission to practice be raised in conformity with recommendations previously made by the California Bar Association.

Of these recommendations only two were enacted into law:

A constitutional amendment was proposed for submission to the people creating two additional Courts of Appeal; and

The Code of Civil Procedure was amended by taking from the law schools the privilege of having their graduates admitted to practice without examination and by slightly increasing the standards for admission.

This change as to admission of attorneys was not nearly so broad as the change deemed desirable by the California Bar Association, which insisted upon three years' study in a law school or office and the creation of a Board of Law Examiners so as to relieve the district courts of appeal of the necessity of conducting examinations of applicants for admission to practice.

The legislature, notwithstanding its unwillingness to accept the suggestions of the lawyers for procedural and other reforms, of its own volition submitted to the people of California a proposed constitutional amendment of potential possibilities more drastic than anything suggested by the bar, for it engrafts upon the fundamental law of this state in principle the provision concerning the courts embodied in the Federal Constitution.[4]

This amendment confers upon the legislature jurisdiction to create "by general law" "such other courts," other than the Supreme Court and the Senate sitting as a court of impeachment, as may seem desirable. And it further provides:

> Upon this section becoming effective the remaining provisions of this article other than section nineteen, whether adopted heretofore or contemporaneously herewith, shall become of the same force and effect as general laws and be subject to repeal or amendment by legislative act adopted pursuant hereto.[5]

It will be seen that this proposed amendment is practically a substitute for Article VI, the judiciary article of the Constitution as it now stands, and that it removes all of the present constitutional guarantees surrounding the judiciary.

Indicative of the fact that the bench and bar of California are no longer hopeful of being able to improve conditions and methods by amending the present law, and are prepared for rapid and sudden changes, both in judicial organization and in procedure, the following thoughtful statement of Mr. Justice Sloss of the Supreme Court of California at a luncheon of the Bar Association of San Francisco furnishes food for thought:

> Formerly at gatherings of lawyers it has been the practice to devote the addresses to extolling the nobility of the profession of the law. That habit is gradually changing and the lawyers are devoting their attention more and more to devising ways and means for improving the law and its administration, with the particular purpose of avoiding delay.
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> This is clearly established by the proceedings of the California Bar Association. Many of the suggestions there made have been tried. New courts, more judges, the abolition of appeals from certain orders, the alternative method of appeal, the simplification of appeals in criminal cases, have all been resorted to in an effort to promote reform.
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> In spite of these efforts the bar has not succeeded in accomplishing anything substantial. In ten years there has been a great increase in the number of judges,

[4] Constitution United States, Sec. 1, Art. III.

[5] Stats. 1917, Chap. 79.

but the increase has not resulted in a speedier administration of justice. The creation of the district courts of appeal has resulted in the hearing of many matters that would not otherwise have been heard, but the courts are as far behind today as ten years ago.

There must be some reason for this lack of activity, for the fact is that no appreciable progress has been made. Probably it has been a mistake to try and tinker with the old machine when as a matter of fact the state may need an entirely new machine.

The bar may well take a leaf out of the book of the nation's experience in the present crisis, when every source of potential efficiency in all walks of life is being developed to its fullest extent for service. We are becoming accustomed to radical changes. The government has overnight embarked upon the construction and operation of ships, in the control of the transportation of foodstuffs and munitions, and now it is proposed to devote millions to the purchase of wheat in order to bring about a more equitable distribution of food.

It does not require a prophetic mind to look forward to the mobilization of the medical and engineering professions under government direction. In view of that, what is to be done by the lawyers? They must establish a system more in accord with the needs of the times. I offer no speculative remedies; the only point that I desire to make in connection with such a situation is that we must go at reform in a far more radical, a larger and more constructive manner, if we expect to accomplish substantial results.

II. EDUCATIONAL REFORMS

Hand in hand with the effort to improve the administration of justice through the courts by simplifying court procedure and improving judicial methods, go efforts to improve the same by improving the standards and education of the bar.

These efforts are of two kinds, one representing the more radical thought of the profession which would reach its goal by reforming the organization and methods of the bar, and the other the more conservative element that seeks to create higher standards through better systems of education.

A typical instance of the first of these methods of reform is the suggestion first made by Mr. R. S. Gray of the San Francisco Bar in a monograph published in *The Recorder*, San Francisco, July 28, 1913, for the creation of an "official trial bar." Mr. Gray's proposition as phrased by himself was:

> That all trials in court should be conducted by members of a trial bar holding public office under civil service system (including efficiency bureau) and prohibited from accepting any private employment while holding such office.

Mr. Gray reasoned from the assumption that the average man seeking a lawyer employs one with a reputation for "bringing home

the bacon" without giving much thought to the methods employed or the short corners turned in doing so. The condition thus created gives certain lawyers more than they can possibly handle and leaves other and frequently just as able but less aggressive men with little or nothing to do.

The result is an inequality of occupation and emolument that is not compatible with the proper administration of justice and in the end is unfavorable to litigants as a class, for the concentration of the bulk of the legal business in the hands of the few causes delay and congestion in the courts with consequent loss of time and money.

To obviate this condition, Mr. Gray suggested that the client should not be permitted to engage his own lawyer, but that the names of trial lawyers who had passed a civil service examination, should be placed in a box similar to that used in drawing jurors, and a prospective litigant desiring legal assistance might go to the official having this box in charge and have him draw from it the name of a lawyer to try his case, the lawyer's fees to be paid out of the public treasury. This system would, according to Mr. Gray's reasoning, improve the character and quality of the bench, because it would remove the incentive from certain lawyers to endeavor to secure the elevation to judicial office of persons amenable to influence. All of the trial lawyers being on an equal footing as to clients the inducement to seek superserviceable judges would be gone.

The evil of commercialization being largely responsible for the present condition, Mr. Gray argued that the remedy was to "take the entire court work out of the control of the pocketbook," thereby improving and facilitating the administration of justice and increasing popular respect for the courts and the law.

This idea Mr. Gray elaborated in an address before the California Bar Association at San Diego in November, 1913, an address that subsequently appeared in the *Journal of Criminal Law and Criminology*, January, 1914, and also again before the Economic Club of San Francisco in a discussion of the question "Is There Any General Fundamental and Vital Defect in Our Present Administration of Justice?"

The fly in the ointment Mr. Gray found to be "commercialism" and "partizanship," and he argued for the removal of these im-

pediments or defects by the reorganization of the bar and the creation of an "official trial bar." Mr. Gray's criticism of the legal profession and his suggestion for its reformation did not meet with favor; indeed it created sharp antagonisms which, however, have since been removed to a large extent.

Early in its career as an influence for reform the California Bar Association endeavored to have the legislature increase the requirements and raise the standards for admission to the bar, adverted to above, by requiring the equivalent of a high school education, three years' study in a law school or office, the removal from the law schools of the privilege of having their students admitted to practice without examination; and the creation of a Board of Law Examiners charged with the examination of all applicants for admission to practice, so relieving the district courts of appeal for other and more important duties.

These recommendations were submitted to the legislature at four successive sessions and were each time refused enactment. At the 1917 session a bill was passed raising the requirements slightly and removing the law schools' "no examination" privilege; but the end sought of putting the education and training of lawyers on much the same plane as the training and examination of doctors, was not accomplished; however, it was a step in that direction.

At the 1914 convention of the California Bar Association at Oakland, a resolution was adopted committing the association to the education of lawyers after admission to the bar and suggesting to the local associations the advisability of providing means for such educational work.

The father of the resolution was Mr. Gray, who had been very successful in "visualizing practice" and "vitalizing decisions" in his work as an instructor at the Y. M. C. A. Law School. Under Mr. Gray's direction a "practice class" for education after admission was established at the Bar Association of San Francisco and conducted for upwards of two years with great benefit and satisfaction to those who attended.

Lack of interest on the part of the association and its Board of Governors in the development of the "practice class" work resulted in its abandonment as an association activity, but the work was continued independently and on a more comprehensive scale by the Bay District Inns of Court.

Another instrumentality that was expected to play a definite

and leading part in the education of the young lawyer before admission to the bar, was the Legal Aid Society, organized in San Francisco in May, 1916, but the society has not as yet measured up to the height of its possibilities in that regard. It had been expected that the Legal Aid Society, which in effect is a legal clinic, would stand in the same relation to the legal profession as does the hospital or free clinic to the medical fraternity, by providing means of practical education for the undergraduate.

The founders had in mind the success of such a movement in Minneapolis where the Legal Aid Society, working in conjunction with the bar association and the associated charities, provides the senior students of the University of Minnesota Law School with an opportunity for practical work in the handling of the cases of poor litigants who come to the society for redress of their wrongs. To that end the assistance and interest of the heads of the nearby law schools was enlisted in the organization of the Legal Aid Society, but as yet no steps have been taken to make the Legal Aid Society perform its logical function in an educational way.

Perhaps this will come in time—the society is a little over a year old—but it does seem as though a splendid opportunity for practical service to the legal profession as well as to the public is being neglected in not providing for student coöperation in this work on a scale that will be of practical benefit to embryo lawyers. Not that some use has not been made of law school students, but the work of practical instruction of students has not, as yet, been thoroughly coördinated with that of the society.

III. THE LAWYER'S OBLIGATION

It is axiomatic that the courts were made for the people and not the people for the courts. As lawyers are officers of the courts, it follows that, in every scheme for the improvement of the administration of justice, the improvement of the lawyer, ethically and educationally, plays a large part. In fact procedural reform, judicial organization and legal education are parts of a problem and must progress together. The lawyer is the vital element in all three phases, and the better fitted he is educationally to cope with the situation, the sooner will the problem be properly solved.

It follows then, as a natural corollary, that the bar, realizing its function and its obligation to maintain the rights of the people and to uphold the law, must, if it would have its profession con-

tinue in its high estate, see to it that the neophytes are not only grounded in the fundamental principles of law, but that they should be furnished with the opportunity to apply those principles through the medium of undergraduate and postgraduate clinical work with the Legal Aid Society, work that will give them an insight into social conditions and problems, coupled; for graduate students, with a well-rounded educational course after admission that will develop their powers of reasoning and observation, and so fit them to undertake their life's vocation, not as fledgelings merely, but fully panoplied in the knowledge of their work and its meaning and of the obligations of service that should be the first consideration of "an officer of the court."

This obligation of service goes not only to legal education for the development of the profession, but to the organization of courts and their methods of work.

The education of the lawyer should be so directed that he will be able to shake off the *laissez faire* doctrine of older days and be willing to reform and even to "junk" judicial systems when they demonstrate their inability to cope with present conditions. The lawyer must be as ready as the captain of industry to discard old methods and old machinery for new ideas and processes that will fit the needs of the times.

It is not out of place in this connection to quote again from the talk of Mr. Justice Sloss, referred to above:

> Probably it has been a mistake to try to tinker with the old machine when as a matter of fact the state may need an entirely new machine. . . . . I offer no speculative remedies; the only point I desire to make in connection with such a situation is that we must go at reform in a far more radical, a larger and more constructive manner, if we expect to accomplish substantial results.

This appears to be the keynote—the crux of the whole situation; upon such a foundation only is progress built.

The problem is cognizable; the solution lies in so coördinating the activities of those who prepare, administer, interpret and apply the law, both in their preparation for that work and in the work itself, that we shall be able, with clear seeing eyes and determining minds to go forward toward better and greater things.

Will the older lawyers take the lead in finding the solution of the problem, or must appeal be made to Caesar, the young man in the law school, the sincere student of the law, both before and after his admission to practice, to come, to realize and to bring relief?